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Supreme Court, U.S.
FILED

No. 03-1099 NOV 18 2003

# In The

# Supreme Court of the United States

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JAMES M. KINDER,

Petitioner

v.

DONA LOSHONKOHL

Respondent

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On Petition For Writ Of Certiorari To The
Court of Appeal of the State of California
Fourth Appellate District, Division One

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

California Civil Code section 47 establishes an absolute privilege from liability from a publication made in any legislative or judicial proceeding or any other official proceeding authorized by law (litigation privilege).

California Civil Code section 47.5 creates an exception to California's absolute litigation privilege by allowing only peace officers to sue for defamation for false claims filed against them if such complaints were knowingly false and made with spite, hatred, or ill will.

Out of this background, the following questions arise:

1. Whether California Civil Code section 47.5 violates the First Amendment of the United States Constitution as improper content-based discrimination.

2. Whether California Civil Code section 47.5 violates the "Petition Clause" of the First Amendment of the United States Constitution.

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## PETITION FOR A WRIT OF CERTIORARI

James M. Kinder respectfully petitions for a writ of certiorari to review the decision of the Court of Appeal of the State of California, Fourth Appellate District, Division One.

## OPINIONS BELOW

The opinion of the California Court of Appeal in Loshonkohl v. Kinder can be found at 109 Cal.App.4th 510, or 135 Cal.Rptr.2d 114 and is appended hereto.

## JURISDICTIONAL STATEMENT

The judgment of the Court of Appeal of the State of California, Fourth Appellate District, Division One, was entered on June 6, 2003. The Court of Appeal denied a timely petition for rehearing on July 2, 2003. On August 20, 2003, the Supreme Court of the State of California denied a petition for review. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). 28 U.S.C. § 2403(b) may apply.

## STATUTORY PROVISIONS

The constitutional provision involved in this case is the First Amendment which provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The California statute involved is section 47.5 of the California Civil Code which provides as follows:

> Notwithstanding Section 47, a peace officer may bring an action for defamation against an individual who has filed a complaint with that officer's employing agency alleging misconduct, criminal conduct, or incompetence, if that complaint is false, the complaint was made with spite, hatred, or ill will. Knowledge that the complaint was false may be provided by a showing that the complainant had no reasonable grounds to believe the statement was true and that the complainant exhibited a reckless disregard for ascertaining the truth.

California Civil Code section 47, to which section 47.5 is an exception, provides as follows:

> A privileged publication or broadcast is one made:
>
> (a) In the proper discharge of an official duty.
>
> (b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure, except as follows:
>
> (1) An allegation or averment contained in any pleading or affidavit filed in an action for marital dissolution or legal separation made of or concerning a person by or against whom no affirmative relief is prayed in the action shall not be a privileged publication or broadcast as to the

person making the allegation or averment within the meaning of this section unless the pleading is verified or affidavit sworn to, and is made without malice, by one having reasonable and probable cause for believing the truth of the allegation or averment and unless the allegation or averment is material and relevant to the issues in the action.

(2) This subdivision does not make privileged any communication made in furtherance of an act of intentional destruction or alteration of physical evidence undertaken for the purpose of depriving a party to litigation of the use of that evidence, whether or not the content of the communication is the subject of a subsequent publication or broadcast which is privileged pursuant to this section. As used in this paragraph, "physical evidence" means evidence specified in Section 250 of the Evidence Code or evidence that is property of any type specified in Section 2031 of the Code of Civil Procedure.

(3) This subdivision does not make privileged any communication made in a judicial proceeding knowingly concealing the existence of an insurance policy or policies.

(4) A recorded lis pendens is not a privileged publication unless it identifies an action previously filed with a court of competent jurisdiction which affects the title of right of possession of real property, as authorized or required by law.

(c) In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground

for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information. This subdivision applies to and includes a communication concerning the job performance or qualifications of an applicant for employment, based upon credible evidence, made without malice, by a current or former employer of the applicant to, and upon request of, one whom the employer reasonably believes is a prospective employer of the applicant. This subdivision authorizes a current or former employer, or the employer's agent, to answer whether or not the employer would rehire a current or former employee. This subdivision shall not apply to a communication concerning the speech or activities of an applicant for employment if the speech or activities are constitutionally protected, or otherwise protected by Section 527.3 of the Code of Civil Procedure or any other provision of law.

(d) (1) By a fair and true report in, or a communication to, a public journal, of (A) a judicial, (B) legislative, or (C) other public official proceeding, or (D) of anything said in the course thereof, or (E) of a verified charge or complaint made by any person to a public official, upon which complaint a warrant has been issued.

(2) Nothing in paragraph (1) shall make privileged any communication to a public journal that does any of the following:
(A) Violates Rule 5-120 of the State Bar Rules of Professional Conduct.
(B) Breaches a court order.
(C) Violates any requirement of confidentiality imposed by law.

(e) By a fair and true report of (1) the proceedings of a public meeting, if the meeting was lawfully convened for a lawful purpose and open to the public, or (2) the publication of the matter complained of was for the public benefit.

## STATEMENT OF THE CASE

Officer Dona Loshonkohl filed the underlying action in the Superior Court of California for the County of San Diego on September 3, 1999, alleging five causes of action for defamation under California Civil Code section 47.5.

Officer Dona Loshonkohl has been a police officer with the City of San Diego Police Department since 1992. Petitioner James M. Kinder has been operating various entities known as Rainbow Rent A Car, Rainbow Tow, Rainbow Cleaners, Rainbow Automotive Repair and Rainbow Carpet Cleaners at the premises located at 3129 India Street, San Diego, California.

On August 14, 1998, while on routine patrol, Officer Loshonkohl noticed a number of vehicles parked in a parking lot at the corner of Walnut Street and Kettner Boulevard. The parking lot belonged to a business named Arts and Crafts Press and was open to the public. Loshonkohl contacted the manager of Arts and Crafts Press, who informed her that the vehicles belonged to petitioner. Loshonkohl went to the parking lot and proceeded to check the DMV records for the vehicles. At the same time, the manager contacted petitioner and informed him of the police presence on the lot.

Petitioner came to the parking lot and angrily confronted Loshonkohl. After other officers arrived after being called by Loshonkohl, steps were taken to inventory the vehicles and to prepare them for impound. Petitioner demanded that a supervisor be present. A sergeant arrived,

and after a conference with the officers at the parking lot, it was decided not to impound the vehicles.

Officer Loshonkohl then initiated a POP (Problem Oriented Policing) project o address the parking problems in the area. Through this POP project other government agencies became involved in the matter. The POP project lasted until August 28, 1999. During the life of the POP project, 145 citations were issued of which 26 were issued to petitioner, and 41 vehicles were towed away and impounded, 16 of which belonged to petitioner.

During the course of the project, petitioner aggressively confronted Loshonkohl numerous times and filed 20 separate citizens complaints with Loshonkohl's superiors, almost all of which Loshonkohl's superiors determined to be "unfounded" or "not sustained." It should be noted that in reality petitioner only filed 5 complaints on September 3, 1998, January 5, 1999, February 25, 1999, May 14, 1999, and June 18, 1999. Loshonkohl's complaint contains 5 causes of action – one for each such complaint. Somehow, at the time of trial and with the trial court's blessing, Loshonkohl's attorney managed to turn these 5 complaints, by subdividing them, into 20.

The trial court found that Loshonkohl suffered various forms of emotional distress and injury to reputation as a result of petitioner's conduct; and, even though Loshonkohl waived both special and punitive damages, awarded her $350,000.00 in general damages. Judgment was entered on September 27, 2001.

Petitioner filed his notice of appeal on November 20, 2001. On June 6, 2003, the Court of Appeal of the State of California, Fourth Appellate District, Division One, affirmed the trial court and on July 2, 2003, denied petitioner's petition for rehearing. On August 20, 2003, the Supreme Court of California denied review.

## REASONS FOR GRANTING THE PETITION

Section 47.5 of the California Civil Code is repugnant to the First Amendment of the Constitution of the United States.

A. California Civil Code Section 47.5 Violates the Right to Freedom of Speech Under the First Amendment of the Constitution of the United States.

Section 47.5 of the Civil Code (Senate Bill 1025) was enacted in 1982, apparently at the urging of and for the benefit of the police chief of San Carlos. The chief of police of San Carlos had been publicly called a drunkard and incompetent by some of his neighbors. The chief was concerned that the decision in Imig v. Ferrar (1977) 70 Cal.App.3d 48, would prevent him from recovering in his slander suit against the neighbors. The Imig court had concluded that an absolute privilege was necessary as to complaints by citizens about police officers to aid supervision of the police:

> We agree with plaintiff that it is disturbing and demoralizing to be subjected to false accusations of brutality, but that may be one of the crosses that a police officer must bear, in light of the power and deadly force the state places in his hand. (Id. at p. 56.)

Senate Bill 1025 passed at the midnight hour of the last day of the session on August 31, 1982, when the legislature was under tremendous pressure to conclude its business. For this reason it also passed with virtually no debate.

Since its enactment, the statute has done exactly what many of its opponents predicted it would do – it has had a chilling effect on citizens filing complaints against police officers, and police officers have filed lawsuits under the statute as a deterrent to citizens contemplating filing official

complaints, as a preemptive strike, or to otherwise gain a strategic advantage. Often police officers have filed their cases in small claims court where the defendant has no right to discovery, no right to counsel, and is often intimidated by the court system itself, whereas the plaintiff officer is used to appearing and testifying in court and is therefore at an advantage.

California has adopted a law that selectively targets citizen complaints based on the message they communicate and selectively targets only one kind of "unprotected" speech – citizen complaints critical of peace officers – while privileging all other statements made in citizen complaint proceedings, no matter how malicious or injurious to reputation they may be.

Not only are citizen complaints against other public officials treated differently, but statements by police officers are treated differently from statements by the citizens who complain against them. Under Civil Code section 47, statements made as a part of any "official proceeding authorized by law," including citizen complaint proceedings, are generally privileged. (See, Imig v. Ferrar (1977) 70 Cal.App.3d 48, 55-56.) The exception embodied in section 47.5 allows a "peace officer" to file an action against a citizen who has alleged police misconduct – but does not apply to any defamatory statements made by police officers. For example, if in the court of a citizen complaint procedure, a citizen accuses a police officer of being drunk and belligerent during a traffic stop, that statement would not be privileged. On the other hand, if the officer responds to the citizen's accusation by asserting that it was the citizen who was drunk and belligerent, the officer's statement is still privileged, if made within the context of this official proceeding. Accordingly, the net effect of section 47.5 is to privilege the statements of one side, but not the other, in citizen complaint proceedings concerning peace officers.

Thus, like the statute struck down in R.A.V. v. City of St. Paul (1992) 505 U.S. 377, 391, 112 S.Ct. 2538, 120 L.Ed.2d 305, section 47.5 "goes even beyond mere content discrimination, to actual viewpoint discrimination." It treats complaints against peace officers differently from complaints against all other public officials. Worse still, within the context of law enforcement complaint proceedings, the statute favors one side's viewpoint (peace officers') over the other's (citizens complainants').

B. California Civil Code Section 47.5 Violates the Petition Clause of the First Amendment of the Constitution of the United States.

The language of the court in Webb v. Fury (W.Va. 1981) 282 S.E.2d 28, illustrates the importance of the Petition Clause:

> [The trial court decision against dismissal] invades the unique constitutional guarantee of the right to petition the government for a redress of grievances contained in the First Amendment to the United States Constitution. The right to petition ... is 'among the most precious of the liberties safeguarded by the Bill of Rights.' It shares the 'preferred place' accorded in our system of government to the First Amendment freedoms, and 'has a sanctity and a sanction not permitting dubious intrusions.' Indeed, ... the right to petition is logically implicit in and fundamental to the very idea of a republican form of government. (Id. at pp. 33-34.)

The main purpose of the First Amendment's Petition Clause is to keep representative government in touch with those it represents. This means that citizens must have the right to criticize the conduct of those operating the

government, even if such criticism is unjustified. While respondent argues that police officers are different from all other public officials, the reality is that open channels of communication are most important with respect to law enforcement. If anything, the rationale for protecting citizen complaints against public officials is strongest where police officers are concerned, "in light of the power and deadly force the state places" in their hands (Imig v. Ferrar (1977) 70 Cal.App.3d 48, 56).

As has been pointed out, despite its purportedly limiting language, California Civil Code §47.5 is not a limit on, but rather an enticement to police officers to file defamation actions against citizen complainants. This case is a good example. The $350,000 judgment was, of course, reported in the media. Anyone, who believes that this judgment does not have a deterrent effect on citizens' complaints, even valid ones, is not living in the real world.

The Maryland Supreme Court recognized the chilling effect such lawsuits have on the right of citizens to complain against the government in the case of Miner v. Novotny (1984) 481 A.2d 508:

In Harford County, Maryland, Deputy Sheriff John Miner stopped Joseph Novotny and charged him with driving under the influence. The deputy claimed that Novotny spit in his face. Novotny filed a police brutality complaint; Miner was exonerated but then sued Novotny for $1,500,000, alleging defamation, intentional infliction of emotional distress, and abuse of administrative procedures for filing the police complaint. But the Maryland court laid down the law:

> It matters not that [the citizen's] complaint may have been made without substantial justification, or that it was unfair or malicious, or that it was motivated by self interest, or that it was

likely to cause professional injury to [the police officer], or even that [the citizen] was pleased by the prospect of causing such injury...

In this country the right of the people to complain to responsible governmental officials about the manner in which the complainant believes himself or herself to have been abused by public officials and other public employees is a fundamental constitutional one expressly reserved to the people. The First Amendment, as we have seen, expressly reserves to the people the right "to petition the Government for redress of grievances." If that right is denied, our government will no longer be representative of the will of the people, which representation is the cornerstone of our republican form of government...

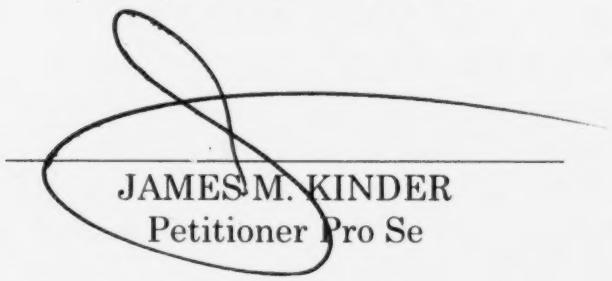
[The police officer] probably feels that he has been maligned by [the citizen], and that the complaint was used . . . as a ploy to compel [the officer] to drop the charges ... Even if that be true, the constitutional right to petition cannot be made subservient to hurt feelings, bruised egos, or tarnished reputations. The First Amendment does not provide that only truthful petitions for redress may be filed. (Id. at pp. 511-513.)

There is no reason for treating citizen complaints in San Diego County, California different than those in Hartford County, Maryland.

## CONCLUSION

Based on the foregoing, it is respectfully requested that this Court grant the instant petition for a writ of certiorari.

Respectfully submitted,



JAMES M. KINDER
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APPENDIX A

D039267

COURT OF APPEAL OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

DONA LOSHONKOHL,
Plaintiff, Respondent,

v.

JAMES M. KINDER,
Defendant and Appellant.

109 Cal.App. 4th 510; 135 Cal.Rptr. 2d 114
June 6, 2003, Filed

COUNSEL: James M. Kinder, in pro. per. for Defendant and Appellant.

Daniel Patrick Tokaji, Ben Wizner, Mark D. Rosenbaum and Jordan C. Budd for Defendant and Appellant and as Amici Curiae on behalf of Defendant and Appellant.

Dan Zeidman and Michelle Principato for Plaintiff and Respondent

JUDGES: McINTYRE, J. WE CONCUR: BENKE, Acting P.J., McDONALD, J.

OPINION BY: McINTYRE

OPINION:

The issue presented in this case is whether Civil Code section 47.5 (undesignated section references are to this code) is unconstitutional under the First Amendment as improper content-based discrimination. We answer this question in the negative and affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

Appellant failed to designate a reporter's transcript of the trial; thus, our factual summary derives from the trial court's statement of decision.

Dona Loshonkohl, a veteran police officer with the City of San Diego Police Department (SDPD), was responsible for establishing good community relations as part of the SDPD's "Community Oriented Policing" program. Part of this program, called the "Problem Oriented Policy" (POP) program, focused on designing solutions to alleviate specific problems within a community.

James M. Kinder operates a car rental business, and several other businesses, from a location on India Street in San Diego. After a confrontation with Kinder on August 14, 1998, Loshonkohl obtained approval for a POP project to deal with problems near Kinder's businesses, including problems with abandoned vehicles, parking, creating a neighborhood eyesore and code violations. The POP project focused on Kinder's businesses and at least six other businesses in the area. During the course of the POP project, Kinder aggressively confronted Loshonkohl on a number of occasions and by the project's conclusion, officers impounded and towed a total of 41 vehicles, 167 of which belonged to Kinder.

Kinder filed 20 complaints with the SDPD regarding Loshonkohl's actions, which he stated were for the purpose

of "revenge". The SDPD individually reviewed, evaluated and investigated 18 complaints; two were treated at "inquiries" because Kinder refused to respond to questions about the complaints. Except where Kinder refused to cooperate, the complaints were determined to be "unfounded", "not sustained" or Loshonkohl was "exonerated."

In September 1998, Loshonkohl filed a complaint against Kinder containing five separate causes of action for defamation under section 47.5. The trial court found section 47.5 constitutional on its face, and as applied, after considering the legislative history of section 47.5, the testimony of two SDPD sergeant and a number of exhibits containing statistical information regarding the number of unmeritorious citizen's complaints.

The trial court concluded that Kinder's "relentless challenges" damaged Loshonkohl's reputation within the SDPD and caused her "grave and serious emotional injury," including loss of self-confidence and depression. Based on a consideration of Loshonkohl's past performance, longevity in the police force, education and skills, the trial court concluded that, as a result of the fallacious complaints and the resulting emotional toll, Loshonkohl was denied career opportunities, including positions as a field training officer, a detective, and a police department recruiter. Based on these findings, the court entered judgment in Loshonkohl's favor in the amount of $350,000.

Kinder filed a notice of appeal from the judgment. About four months later, he filed a motion to set aside the judgment based on a recent appellate court decision declaring section 47.5 unconstitutional on its face as violative of the right to free speech. (Walker v. Kiousis (2001) 93 Cal.App.4th 1432, 114 Cal.Rptr. 2d 69 (Walker). The trial court denied the motion, concluding it lacked jurisdiction to set aside the judgment, the trial court found that the facts in Walker were distinguishable

and concluded that the Walker court had incorrectly addressed the constitutional issue.

## DISCUSSION

Section 47, subdivision (b) (section 47(b)), creates an absolute privilege from liability for a publication made in any legislative or judicial proceeding or "any other official proceeding authorized by law." Traditionally, section 47(b) protected citizens who complained about police misconduct from liability for their statements. However, section 47.5, which was enacted in 1982, creates an exception to the absolute privilege under section 47(b). ( Walker, supra, 93 Cal.App.4th at p. 1440, citing Imig v. Ferrar (1977) 70 Cal.App.3d 48, 54-57, 138 Cal. Rptr. 540.) It allows peace officers to bring defamation claims against those who file complaints against them for "misconduct, criminal conduct, or incompetence" with their employers if the complaint is knowingly false and made with "spite, hatred, or ill will." (§ 47.5.)

While the First Amendment to the United States Constitution protects freedom of speech, the United States Supreme Court has recognized several categories of speech that can be regulated "because of their constitutionally proscribable content," including obscenity, fighting words and defamation. (R.A.V. v. City of St. Paul, Minnesota (1992) 505 U.S. 377, 383, 120 L.Ed.2d 305, 112 S. Ct. 2538 (R.A.V.), italics omitted.) Although these categories of speech may be regulated, the government may not regulate within these categories based on content, in other words, based on disapproval of the ideas expressed. (People v. Stanistreet (2001) 29 Cal.4th 497, 507, 127 Cal.Rptr. 2d 633, 58 P.3d 465 (Stanistreet).) As an often cited example of this principle, the government may ban libel because it is an unprotected category, but it may not discriminate based on content by

banning only libel that criticizes the government. (R.A.V., supra, 505 U.S. at p. 384.)

The rationale governing the proscription against content discrimination is to prevent the government from "driving certain ideas or viewpoints from the marketplace." ( R.A.V., supra, 505 U.S. at p. 387, citations omitted.) Based on this rationale, the United States Supreme Court has identified three situations in which content discrimination does not threaten the expression of ideas (and is therefore constitutional): (1) situations where the basis for the discrimination "consists entirely of the very reason the entire class of speech at issue is proscribable" ( id. at p. 388); (2) situations where the discrimination is based on the "secondary effects" of the speech and is "justified without reference to the content of the . . . speech" ( id. at p. 389, italics omitted); or (3) in other situations, "so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot" ( id. at p. 390).

The Walker court concluded that section 47.5 was content-based discrimination because it restricted "defamatory speech against one group of public officials, peace officers, while leaving intact the privilege under section 47 for defamatory speech against all other public officials" ( Walker, supra, 93 Cal.App.4th at p. 1448.) The court also noted that the statute discriminated based on viewpoint because it made actionable only defamatory complaints against peace officers, while leaving privileged defamatory statements made by a peace officer during a formal complaint proceeding. ( Id. at p. 1449.) The Walker court declared section 47.5 unconstitutional on its face, concluding that none of the exceptions articulated in R.A.V. applied. ( Walker, supra, 93 Cal.App.4th at pp. 1450-1454, 1457.)

After Division Two of this District issued the Walker opinion, and during the pendency of this appeal, the California

Supreme Court issued its decision in Stanistreet. In Stanistreet, the court addressed the constitutionality of Penal Code section 148.6, which makes it is a misdemeanor to file a knowingly false allegation of misconduct against a peace officer. ( Stanistreet, supra, 29 Cal.4th at p. 501.) The Legislature enacted Penal Code section 148.6 in 1995 to fill a gap created after courts interpreted Penal Code section 148.5 as not applying to complaints by the public against peace officers. ( Stanistreet, supra, 29 Cal.4th at pp. 502-503; Pen. Code, § 148.5 [reporting commission of a crime to a peace officer knowing the report to be false is a misdemeanor].) The Stanistreet court expressly recognized that, in criminalizing knowingly false statements about peace officer misconduct (rather than the commission of a crime), Penal Code section 148.6 gives "protection" to peace officers that the Legislature has not given to others. (Stanistreet, supra, 29 Cal.4th at pp. 502-503.)

After stating that Penal Code section 148.6 proscribes only constitutionally unprotected speech (knowingly false statements), the Stanistreet court acknowledged the statute could still be unconstitutional if it discriminates based on content. (Stanistreet, supra, 29 Cal.4th at pp. 506-508.) "Content discrimination 'raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace' . . . ." ( R.A.V., supra, 505 U.S. at p. 387, citing Simon & Schuster, Inc. v. Members of the News York State Crime Victims Bd. (1991) 502 U.S. 105, 116, 116 L.Ed. 2d 476, 112 S. Ct. 501.) The court then applied the three categories of permissible content discrimination identified by the R.A.V. court to determine whether Penal Cod section 148.6 threatened to drive certain ideas or viewpoints from the marketplace. (Stanistreet, supra, 29 Cal.4th at pp. 508-511, three categories listed ante.) Although the Stanistreet court concluded that Penal Code section 148.6 falls within all three categories (Stanistreet, supra, 29 Cal.4th at p. 508), we begin our discussion with the third R.A.V. exception, which

applies where "the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." (R.A.V., supra, 505 U.S. at p. 390.)

The Stanistreet court rejected the argument that formally filed complaints of police officer misconduct are disfavored subjects, stating such complaints are actually favored. (Stanistreet, supra, 29 Cal.4th at p. 510.) It also rejected the argument that Penal Code section 148.6 had a "chilling effect" on the exercise of the constitutional right to free speech, concluding that Penal Code section 148.6 created no realistic possibility of the official suppression of ideas because "the Legislature is not suppressing all complaints of police misconduct, only knowingly false ones." ( Stanistreet, supra, 29 Cal.4thh at pp. 509-510.) The court noted that extending Penal Code section 148.6 to all complaints of public employee misconduct would not reduce this perceived chilling effect and that the statute survived any constitutional challenge based on overbreadth because the scienter requirement protected those that honestly misperceived facts. ( Stanistreet, supra, 29 Cal.4thh at pp. 510-511.)

The question presented is whether the reasoning of Stanistreet applies to validate section 47.5. Because Stanistreet was decided after briefing in this case, we invited the parties to submit supplemental letter briefs discussing application of the Stanistreet reasoning to the present appeal. They have done so, and we have received and considered those submissions.

While the Stanistreet court expressly declined to render an opinion on the validity of section 47.5, we conclude, as discussed below, that the Stanistreet reasoning as to the third R.A.V. exception applies equally to section 47.5 and we affirm on this ground. We therefore only briefly address the first and second R.A.V. exceptions and note that these exceptions arguably do not apply to section 47.5. The Stanistreet court

validated Penal Code section 148.6 under the first and second R.A.V. exceptions, concluding that the "potential harm" of knowingly making false complaints against a peace officers is greater than the potential harm of similar complaints against other public officials because the agencies accepting these complaints have a legal obligation to expend public resources to investigate, retain and report the findings. ( Stanistreet, supra, 29 Cal.4th at pp. 508-509.) The expenditure of public resources also constituted a "secondary effect" that justified Penal Code section 148.6 without regard to content. (Stanistreet, supra, 29 Cal.4th at p. 509.) This rationale is inapposite to section 47.5, a statute designed to redress personal harm suffered by individual peace officers. Similarly, the "emotive impact of [defamatory] speech on its audience is not a 'secondary effect.'" ( Boos v. Barry (1988) 485 U.S. 312, 321, 99 L. Ed. 2d 333, 108 S. Ct. 1157.)

As to the third R.A.V. exception, Kinder and amici counsel advance arguments similar to those rejected in Stanistreet, contending that section 47.5 impermissibly applies to only a group of victims and a realistic possibility exists that section 47.5 will suppress truthful citizen complaints. However, these arguments fail for the reasons articulated by the Stanistreet court. As an intermediate appellate court we are bound by decisions of our Supreme Court and we must follow the reasoning found therein. ( Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455, 20 Cal. Rptr. 321, 369 P.2d 937.)

Section 47.5 makes actionable only formal complaints against peace officers based on knowingly false statements of fact, speech that is constitutionally unprotected. ( Stanistreet, supra, 29 Cal.4th at p. 501; Garrison v. Louisiana (1964) 379 U.S. 64, 72-73, 13 L. Ed. 2d 125, 85 S. Ct. 209.) The scienter requirement "'protects witnesses who honestly misperceive facts. Those who knowingly give false information to police

officers should be discouraged from doing so.' [Citation.]" (Stanistreet, supra, 29 Cal.4th at p. 511.) Further, section 47.5 provides an additional safeguard not included in Penal Code section 148.6, that the speech must be made with "spite, hatred, or ill will." (§ 47.5.) This extra requirement exceeds the standards enunciated by the United States Supreme Court for the recovery of defamation damages by public officials. (New York Times Co. v. Sullivan (1964) 376 U.S. 254, 279-280, 11 L. Ed. 2d 686, 84 S. Ct. 710 [public official may recover for defamatory falsehood relating to official duties if statement is made with "actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not."].) Thus, the potential for defamation liability under section 47.5 creates no realistic possibility of the official suppression of ideas because "the Legislature is not suppressing all complaints of police misconduct, only knowingly false ones." ( Stanistreet, supra, 29 Cal.4th at p. 509.)

While Kinder correctly points out that section 47.5 gives peace officers a right to sue for defamation damages that is not afforded to other public officials, this does not render the statute constitutionally infirm. As noted by the high court in R.A.V., the underinclusiveness of a regulation restricting "totally proscribable speech" need not be justified by reference to a neutral basis "so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." ( R.A.V., supra, 505 U.S. at p. 390.) As discussed above, there is no realistic possibility that section 47.5 results in the official suppression of ideas.

While citizen complainants have not received the reciprocal right to sue peace officers for defamation committed against them during the investigation of their complaints, this lack of reciprocity is not startling, nor does it render the statute unconstitutional. Citizen complainants are not similarly situated and there is no indication peace officer defamation of

citizen complainants poses a problem. "The First Amendment does not require States to regulate for problems that do not exist." ( Burson v. Freeman (1992) 504 U.S. 191, 207, 119 L. Ed. 2d 5, 112 S. Ct. 1846.) It was entirely reasonable for the Legislature to make a policy judgment that only formal complaints against peace officers should be exempted from the absolute litigation privilege of section 47(b).

Moreover, it is important to realize that section 47.5 does not prohibit expression of ideas, political concepts or criticisms of peace officers, specifically or in general. Section 47.5 only exempts a limited class of complainants – those individuals who, with spite, hatred or ill will, make knowingly false complaints against peace officers with the officer's employing agency – from the protections of the absolute litigation privilege (§ 47(b)). While it is true that a peace officer could falsely accuse the citizen complainant of a crime during investigation of the complaint and the complainant would have no right to sue for defamation ( Walker, supra, 93 Cal.App.4th at p. 1449), section 47.5 does not absolve peace officers from liability for defamation that otherwise does not fall under the section 47(b) privilege. (See Silberg v. Anderson (1990) 50 Cal.3d 205, 212, 266 Cal.Rptr. 638, 786 P.2d 365 ["privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action ]"]. Under the reasoning of Stanistreet, section 47.5 is constitutional because it falls within the third category of permissible content discrimination identified in R.A.V.

Because we conclude section 47.5 is constitutional, we do not reach Loshonkohl's alternative argument that we can affirm the judgment under common law defamation without reliance on section 47.5 because Kinder abused the section 47 privilege, except to note that Loshonkohl did not assert a common law defamation theory in her complaint. Finally, we

do not address Kinder's argument, raised for the first time in his reply brief, that the judgment must be reversed because the damage award was excessive as a matter of law since he did not preserve this issue by seeking a new trial based thereon. ( Schroeder v. Auto Driveaway Co. (1974) 11 Cal.3d 908, 918-919, 114 Cal. Rptr. 622, 523 P.2d 662.)

## DISPOSITION

The judgment is affirmed. Loshonkohl is to recover costs.

McINTYRE, J.

WE CONCUR:

BENKE, Acting P. J.

McDONALD, J.

APPENDIX B

Court of Appeal, Fourth Appellate District,
Division One – No. D039267

S117535

IN THE SUPREME COURT OF CALIFORNIA

En Banc

DONA LOSHONKOHL, Plaintiff and Respondent,

v.

JAMES M. KINDER, Defendant and Appellant.

Petition for review DENIED.

Werdegar, J., is of the opinion the petition should be granted.
Baxter, J., was absent and did not participate.

s/ GEORGE
Chief Justice

August 20, 2003, Filed.